No. 80-341

In The

Supreme Court of the United States

October Term, 1980

STEPHEN DIRK WERNETH,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT

Respondent, the State of Idaho, respectfully requests that the petition of Stephen Dirk Werneth for a writ of certiorari, to review the decision of the Supreme Court of Idaho be denied. The decision is reported at 611 P. 2d 1026 (1980).

REASONS WHY THE WRIT SHOULD BE DENIED

The dismissal of the first charge against petitioner was followed by the prosecution of a second and legally different charge against petitioner, in consequence of which petitioner's conviction of the subsequently charged offense was not violative of the Double Jeopardy Clause of the Constitution.

Petitioner, Werneth, presents only an assertion that the Double Jeopardy Clause was violated in his case.

Werneth was at first charged with embezzlement by a bailee, a violation of § 18-2407 of the *Idaho Code*. After a jury had been empaneled and witnesses sworn, the State moved to amend the Information in order to charge embezzlement by a corporate officer, a violation of *Idaho Code*, § 18-2402, instead of embezzlement by a bailee, to which Werneth objected. After failing in this effort, the State moved to dismiss in order to file a new charge, based on the same transaction, but charging an embezzlement by a corporate officer. *State v. Werneth*, 611 P. 2d 1026 (1980).

The Idaho Supreme Court concluded that Werneth had not been twice placed in jeopardy for the same offense. The court reasoned that the two charges were different, as judged by tests previously stated by this Court.

> . . . I. C. § 18-2402 and I. C. § 18-2407 constitute two distinct offenses. I. C. § 18-2402 requires proof that the embezzler was a public or corporate officer, which I. C. § 18-2407 does not require. On the other hand, I. C. § 18-2407 requires proof that the embezzler converted property to his own use which had been entrusted to him as bailee, tenant or lodger. I. C. § 18-2402 requires no such proof. Moreover, proof of facts necessary for conviction under one statute would nec-

> essarily preclude conviction under the other. Thus, each statute requires proof of an additional fact which the other does not. Under the *Blockburger*[1] test, these two Idaho statutes are sufficiently distinguishable to permit successive prosecutions in the present case.
>
> *State v. Werneth,* 611 P. 2d at 1028.

It is apparent that had petitioner been tried and convicted of the offense of embezzlement by a bailee, when the proof showed that he held the embezzled property as a corporate officer, he would have been entitled under Idaho law to prevail on appeal because a material variance between the pleading and the proof *could* subject an accused to the risk of being placed twice in jeopardy, or being misled in preparing his defense. The Idaho Supreme Court has held that such a variance is impermissible, *State v. Love,* 76 Idaho 378, 283 P. 2d 925 (1955), which persuasively indicates that the two offenses are legally different and that the petitioner was never in jeopardy of conviction of the first charge. The Double Jeopardy Clause is not implicated unless the defendant has been put to the risk of conviction. *Serfass v. United States,* 420 U. S. 377 (1975).

In *Brown v. Ohio,* 432 U. S. 161 (1977), this Court held that where the same transaction is violative of two different statutes, the test of whether there are two distinct offenses, for the purpose of double jeopardy analysis, is whether each statute requires proof of some additional fact which is not part of the proof necessary to establish a violation of the other. *See also: Blockburger v. United States, supra.*

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1 *Blockburger v. United States,* 284 U. S. 299 (1932).

The purpose of the Double Jeopardy Clause to bar successive prosecutions is served by the *Blockburger* test.

> This test emphasizes the elements of the two crimes: "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." Iannelli v. United States, 420 U. S. 770, 785 n. 17 (1975).
>
> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.
>
> *Brown v. Ohio,* 432 U. S. at 166.

Petitioner argues that he was in jeopardy at his first trial because the jury was sworn before the charge was dismissed. That fact is not always controlling. A mid-trial dismissal procured by defendant for reasons not affecting the question of factual guilt or innocence does not bar a succeeding prosecution for the *same* offense. *United States v. Scott,* 437 U. S. 82 (1978). That being the case, it can hardly be thought that a successive trial on a *different* charge is barred by the Double Jeopardy Clause. *Brown v. Ohio, supra.*

Petitioner's reliance on *Crist v. Bretz,* 437 U. S. 28 (1978), is misplaced. The question decided there was whether the federal rule that jeopardy attaches after the jury has been empaneled was of constitutional dimension, not whether the Double Jeopardy Clause bars a succeeding trial on a different charge arising out of the same transaction.

———o———

CONCLUSION

For the reasons stated, the petition of Stephen Dirk Werneth for a writ of certiorari should be denied.

Respectfully submitted,

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